Filed 8/12/13 P. v. Sharkey CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ANDREW BRIAN SHARKEY,** **Defendant and Appellant.**	**A134972** **(Sonoma County Super. Ct. No. SCR-564196)**

Andrew Brian Sharkey (appellant) appeals from a final judgment of conviction following a no contest plea. Appellant contends that (1) the trial court erred in denying his request for substitute appointed counsel, and (2) he was denied assistance of counsel when he personally filed and argued a motion to withdraw his no contest plea because his attorney declined to file it on his behalf. We reject appellant's contentions and affirm.

BACKGROUND

Appellant was charged with murder with the use of a deadly weapon (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1)), and with the special circumstance that the murder was committed during a residential burglary (*id.*, § 190.2, subd. (a)(17)). He was also charged with elder abuse causing death (*id.*, § 368, subds. (b)(1) & (3)), first degree burglary (*id.*, § 459), and attempted procurement of another to commit perjury (*id.*, §§ 127, 664).

Appellant was initially represented by the public defender's office. For reasons not apparent from the record, the public defender's office was relieved early in the proceedings and Attorney Geoffrey Dunham was appointed. Dunham contracted with Attorney Bruce Enos to assist him in representing appellant.

On June 1, 2011, at appellant's request, a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) was held regarding appellant's request to replace his trial counsel. Appellant contended, and court records confirmed, that Enos had previously prosecuted a Solano County drug court case against appellant. The drug court case had taken place approximately 10 years earlier and Enos did not recall the proceeding. The trial court found that a "legal conflict" existed and granted appellant's *Marsden* motion as to Enos. Appellant did not object at that time to his continued representation by Dunham. Subsequently, Dunham retained Attorney Erik Bruce to assist him in representing appellant.

On November 10, 2011, appellant pled no contest to all counts except for the special circumstance allegation that the murder took place during the commission of a burglary. As part of the plea agreement, the People agreed to dismiss that allegation.

In January 2012, appellant, acting personally rather than through counsel, submitted a handwritten motion to withdraw his no contest plea. His motion set forth multiple grounds relating to the effectiveness of his counsel. At the same time, appellant submitted a letter to the trial court asking for another *Marsden* hearing, claiming that his attorneys had been ineffective throughout the criminal proceedings, and proclaiming his innocence.

On February 8, 2012, the trial court held a *Marsden* hearing outside the presence of the prosecutor. The trial court allowed appellant to speak at length about the reasons for his dissatisfaction with both Dunham and Bruce, some of which involved conduct in connection with appellant's no contest plea. The trial court also asked Dunham and Bruce to respond to each of appellant's allegations. At the conclusion of the *Marsden* hearing, the trial court denied appellant's request for new counsel, finding neither "any

deficiency in [counsel's] representation" nor "any irreconcilable conflict in the relationship [between appellant and counsel]."

The trial court then proceeded to hear, in open court, appellant's motion to withdraw his no contest plea. At the outset, Bruce informed the trial court, "This is not my motion. This is not a motion that I suggested [appellant] file. And this is not a motion upon which I consent to its filing, if I have any standing to give such consent. . . . I believe that [appellant] needs to proceed in pro per on this motion." Bruce offered to advise appellant as he proceeded on his motion. The trial court noted "the awkwardness of the situation" and queried whether appellant "would be entitled to file such a motion." It further stated, "[i]t's not my intent to allow [appellant's attorneys] to withdraw, and [appellant] has not requested that he represent himself." Appellant then asked whether he should "request a *Faretta* motion"[1] to represent himself. The trial court responded, "Well, I don't give legal advice. That's something you can discuss with your attorney. And a decision you can arrive at on your own. I'm not going to prevent you from addressing the court this morning, . . . but that type of request is between you and your attorney. And it's up to you to make that type of decision."

Appellant proceeded to personally argue his motion to withdraw the plea. At the conclusion of the hearing the trial court denied the motion, finding that there had been no "deficiency of counsel in representation" and that appellant "knowingly, voluntarily and intelligently entered his respective pleas and admission."

Appellant obtained a certificate of probable cause. This appeal followed.

DISCUSSION

I. *The Marsden Motion*

A. *Standard of Review*

" 'A trial court should grant a defendant's *Marsden* motion only when the defendant has made "a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." ' [Citation.] [¶] 'We review the

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[1] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

denial of a *Marsden* motion for abuse of discretion.' [Citation.] 'Denial is not an abuse of discretion "unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel." ' [Citation.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 230.)

B. *Enos's Conflict*

Appellant first contends that the trial court's denial of his *Marsden* motion was an abuse of discretion because Enos's conflict should have been imputed to Dunham and Bruce.

As an initial matter, the People claim that appellant failed to raise this ground below. However, during the second *Marsden* hearing appellant stated: "I feel that the -- being in partnership in the office Dunham and Mr. Enos, with Mr. Enos's relief of counsel, I believe the office would have -- should have been held in default also, and that a new counsel should have been offered. And that Mr. Dunham should have been dismissed at the time. Therefore, with the office in default, Mr. Bruce wouldn't have been brought in under Mr. Dunham, to assist in the case . . . ." This is sufficient to preserve the issue for appeal, particularly for a defendant acting on his own behalf in a *Marsden* hearing.

However, appellant's claim lacks merit as there is no basis to impute any conflict with Enos to Dunham or Bruce. The cases cited by appellant all involve conflicts claimed by a *prior* client due to the concern that confidential information obtained during the course of the prior representation could be used adversely to that client. As the Supreme Court explained in one of the cases cited by appellant: "Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. [Citation.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146.) Such conflicts may be imputed to other members of the attorney's firm because attorneys in the same firm "presumptively share access to privileged and confidential matters." (*Id.* at p. 1153.)

Here, however, appellant was the *current* client, rendering the above cases inapplicable. The potential for a conflict with a criminal defendant due to successive representations arises if the attorney's duties to a former client impair the attorney's ability to effectively represent the defendant. For example, if the prior client is a witness for the prosecution in the defendant's case, a conflict may arise if counsel's ability to effectively cross-examine the witness will be impaired by the inability "to use against [the] former client any confidential information acquired during that attorney-client relationship. [Citations.]" (*People v. Cox* (2003) 30 Cal.4th 916, 949, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.) Even if there were the possibility of that type of conflict here, appellant has cited no cases imputing such a conflict to an associated defense attorney who had no attorney-client relationship with the prior client.

Moreover, appellant does not claim that Enos obtained any confidential information during his prosecution of appellant that he could have conveyed to Dunham or Bruce. To the contrary, appellant's only specific concern with Enos's prosecution was that appellant was "uncomfortable being represented by a former [district attorney] from the prosecution." The substitution of Bruce for Enos entirely addressed his concern.

Accordingly, the trial court did not err in denying appellant's *Marsden* motion due to Enos's conflict.

C. *Ineffective Assistance of Counsel*

Appellant next contends the trial court erred in denying his *Marsden* motion in light of his motion to withdraw his plea. He argues a conflict of interest existed because his motion to withdraw his plea claimed he received ineffective assistance of counsel, thereby placing his counsel in "an untenable position" with respect to that motion.

The Supreme Court has recognized that, "when a defendant claims after trial or guilty plea that defense counsel was ineffective, and seeks substitute counsel to pursue the claim, the original attorney is placed in an awkward position. . . . The potential for conflict is obvious." (*People v. Smith* (1993) 6 Cal.4th 684, 694 (*Smith*).) But the existence of a *potential* conflict is not a sufficient basis for a *Marsden* motion. (See

People v. Sanchez (2011) 53 Cal.4th 80, 89 (*Sanchez*).) In *Smith*, the Supreme Court affirmed the trial court's denial of a *Marsden* motion even though the defendant was moving to withdraw his plea on the ground that his counsel was ineffective. (*Smith, supra,* 6 Cal.4th at pp. 696-697.)

Here, as in *Smith*, the trial court "fully allowed [appellant] to state his complaints, then carefully inquired into them. Defense counsel responded point by point." (*Smith, supra,* 6 Cal.4th at p. 696.) Appellant and his counsel disagreed on the facts underlying many of his allegations, but "the court was 'entitled to accept counsel's explanation.' [Citation.]" (*Ibid.*) The trial court's conclusion that there was no irreconcilable conflict was not an abuse of discretion.

D. *Defense Counsel's Refusal to File a Motion to Withdraw Appellant's Plea*

Finally, appellant argues he should have been granted substitute counsel because his trial counsel refused to file or argue a motion to withdraw his no contest plea and he was entitled to have counsel represent him on that motion.

As an initial matter, the People argue appellant failed to include this claim as an express ground for his *Marsden* motion. But, given the motion to withdraw his no contest plea was handwritten and submitted directly by appellant, it was plain appellant's trial counsel was not assisting him with the motion. Moreover, the only remaining proceedings for which appellant was seeking substitute counsel were the motion to withdraw the plea and sentencing. Such circumstances provided a sufficiently clear indication appellant wanted a substitute attorney to pursue the motion to withdraw his plea. (*Sanchez, supra,* 53 Cal.4th at p. 90.)

In any event, we reject appellant's contention on the merits. "A criminal accused has only two constitutional rights with respect to his legal representation, and they are mutually exclusive. He may choose to be represented by professional counsel, or he may knowingly and intelligently elect to assume his own representation. [Citation.]" (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) "When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not [the] defendant, who is in charge of the case. By choosing professional representation, the

accused surrenders all but a handful of 'fundamental' personal rights to *counsel's* complete control of defense strategies and tactics. [Citations.]" (*Id.* at p. 1163.)

A defendant does have the right to decide whether to pursue a meritorious motion to withdraw a plea. For example, in *People v. Osorio* (1987) 194 Cal.App.3d 183, 188-189, disapproved of on another ground in *People v. Johnson* (2009) 47 Cal.4th 668, 681-683, the court found that the defendant had received ineffective assistance of counsel when his attorney represented that the defendant had meritorious grounds for a motion to withdraw his guilty plea but refused to file such a motion because going to trial would greatly increase the defendant's penalty exposure.

However, a defendant may not demand that his attorney file a *meritless* motion to withdraw his plea. (*Smith, supra,* 6 Cal.4th at pp. 695-696 [if substitute counsel is appointed after a defendant has entered into a plea agreement, "[s]ubstitute counsel could then investigate a possible motion to withdraw the plea . . . based upon alleged ineffective assistance of counsel. Whether, after such appointment, any particular motion should actually be made will, of course, be determined by the new attorney."]; *People v. Brown* (2009) 175 Cal.App.4th 1469, 1472 ["Although criminal defendants are entitled to competent representation in the presentation of a motion to withdraw a plea, appointed counsel may properly decline to bring a meritless motion."]; *People v. Makabali* (1993) 14 Cal.App.4th 847, 851-853 [conflict counsel appointed to investigate possible ineffective assistance claim in connection with no contest plea was not required to file frivolous motion].)

Appellant's reliance on *People v. Brown* (1986) 179 Cal.App.3d 207, is misplaced. Appellant makes much of the court's statement that: "We view the decision to seek withdrawal of a plea of guilty, just as the decision to enter such plea, as one which the defendant is entitled to make. [Citations.] The defendant's attorney may, and when appropriate, should advise against the decision, but the defendant should have the final word on whether to seek withdrawal." (*Id.* at p. 215.) However, the court also acknowledged that counsel is not "compelled to make a motion which, in counsel's good

faith opinion, is frivolous or when to do so would compromise accepted ethical standards," a "state of affairs" that was not before the *Brown* court. (*Id.* at p. 216.)

During the *Marsden* hearing, the trial court heard in great detail appellant's arguments that his trial counsel had been ineffective with respect to his plea agreement. At the conclusion of that hearing, the trial court rejected appellant's allegations that his counsel was ineffective with respect to his no contest plea, finding that there had been no "deficiency in [counsel's] representation whatsoever." Each basis argued by appellant in his motion to withdraw had been raised as a basis for his *Marsden* motion, considered by the court, and found insufficient. In effect, the trial court determined during the *Marsden* hearing that the motion to withdraw the plea was meritless, and therefore that appellant's counsel had properly refused to file it. We find no error in this determination, and affirm the denial of appellant's *Marsden* motion.

II. *Appellant's Motion to Withdraw His No Contest Plea*

Finally, appellant argues he was denied the right to counsel, due process, and a fair trial because he filed and argued the motion to withdraw his no contest plea without the assistance of counsel. Appellant claims that he should have either been granted substitute counsel or the trial court should have conducted a *Faretta* inquiry to permit him to represent himself.

We have already determined that the trial court properly concluded that appellant was not entitled to substitute counsel or to compel his counsel to file a meritless motion to withdraw his no contest plea. Further, appellant never requested self-representation, and, so, the trial court was not required to conduct a *Faretta* inquiry. (*People v. Stanley* (2006) 39 Cal.4th 913, 932 [*Faretta* inquiry triggered when trial court is " 'confronted with a request' for self-representation"].) The error, if any, made by the trial court was in permitting appellant to pursue his frivolous motion despite counsel's refusal to file or argue it. (See *In re Barnett* (2003) 31 Cal.4th 466 [refusing to consider represented defendant's pro se submissions that fell within the scope of counsel's representation].)

Providing appellant with an opportunity to which he was not legally entitled was entirely harmless.[2]

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

[2] The cases cited by appellant for the proposition that the denial of the right to counsel requires reversal are not applicable, as appellant was not denied the right to counsel.